

HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES OF AMERICA,

Plaintiff,

v.

10.56 ACRES, MORE OR LESS,  
SITUATED IN WHATCOM COUNTY,  
WASHINGTON, et al.,

Defendants.

CASE NO. C07-1261RAJ

ORDER

**I. INTRODUCTION**

This matter comes before the court on cross-motions for summary judgment (Dkt. ## 14, 17). Although the United States has requested oral argument, the court finds the purely legal question that these motions present suitable for disposition on the basis of the parties' motions and submissions in support thereof. For the reasons stated below, the court GRANTS Defendants' motion (Dkt. # 14) and DENIES the United States' motion (Dkt. # 17).

**II. BACKGROUND**

The United States is expanding its port of entry facility at the "Peace Arch" Canadian border crossing near Blaine, Washington. Interstate 5 ("I-5") is the principal highway bringing travelers to the Peace Arch. The property at issue in this action

1 consists of several parcels of land that Washington (the “State”) owned until the United  
2 States condemned them. The parcels serve as rights-of-way for I-5 near the Peace Arch.

3 The facts necessary to dispose of the motions before the court are not in dispute.  
4 To prepare for the port of entry expansion, the United States acquired the property  
5 through eminent domain. The State does not contest the United States’ right to condemn  
6 the property.

7 I-5 is currently a ground-level roadway at the Peace Arch. The port of entry  
8 expansion, however, will require that a portion of I-5 be reconstructed as an elevated  
9 roadway passing over the expanded port of entry. The United States intends to construct  
10 the elevated roadway. The State does not dispute that the elevated roadway will have at  
11 least enough traffic capacity to serve as an adequate substitute for the existing roadway.  
12 After completing construction, the United States will transfer ownership of the elevated  
13 roadway itself back to the State by conveying air rights above the condemned property,  
14 along with surface and subsurface rights sufficient to permit maintenance of the elevated  
15 roadway. In the end, the State will own the elevated roadway, just as it owned the current  
16 ground-level roadway. Critically for purposes of these motions, the State will also be  
17 responsible for operating and maintaining the elevated roadway throughout its lifespan,  
18 just as it was responsible for operating and maintaining the ground-level roadway.

19 The parties also do not dispute, at least for purposes of these motions, that the  
20 elevated roadway will impose greater operating and maintenance costs on the State than  
21 continued operation of the ground-level roadway would have. The parties have reached  
22 no agreement as to the amount by which costs will increase, but the State asserts that  
23 operating and maintaining the elevated roadway will cost an additional \$12 million over  
24 its lifespan. The court adopts that figure solely for illustrative purposes in resolving these  
25 motions.

26 The United States asserts that conveying the elevated roadway to the State will  
27 satisfy its constitutional obligation to justly compensate the state for the condemned

1 property. The State contends that the United States must also compensate it for the  
2 increased operating and maintenance costs of the elevated roadway.

### 3 **III. ANALYSIS**

#### 4 **A. These Motions Present a Purely Legal Takings Clause Question.**

5 The instant dispute comes to the court on motions for summary judgment, but its  
6 disposition turns solely on a legal question: does the “substitute facilities doctrine”  
7 permit a court to award a condemnee compensation for the increased costs of operating  
8 and maintaining an adequate substitute facility? Before turning to the Fifth Amendment  
9 underpinnings of that legal question, the court notes that on a motion for summary  
10 judgment, the court defers to neither party in resolving legal questions. *See Bendixen v.*  
11 *Standard Ins. Co.*, 185 F.3d 939, 942 (9th Cir. 1999) (noting that if “a motion for  
12 summary judgment is merely the conduit to bring [a] legal question before the district  
13 court,” then “the usual tests of summary judgment, such as whether a genuine dispute of  
14 material fact exists, do not apply.”). The motions before the court raise no disputed  
15 issues of material fact, rendering further discussion of the standard for summary  
16 judgment unnecessary. *See* Fed. R. Civ. P. 56(c) (establishing that summary judgment  
17 should be rendered when “there is no genuine issue as to any material fact and . . . the  
18 movant is entitled to judgment as a matter of law”).

19 The Fifth Amendment’s Takings Clause prohibits the taking of “private property”  
20 for “public use” without “just compensation.” U.S. Const. amend. V. State property that  
21 the federal government condemns is considered “private property” subject to the Takings  
22 Clause. *United States v. 50 Acres of Land (“Duncanville”)*, 469 U.S. 24, 31 (1984). In  
23 this case, the State does not dispute that the United States condemned the property for  
24 public use. The only question before the court, therefore, is what constitutes “just  
25 compensation” for the instant taking.<sup>1</sup>

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27 <sup>1</sup> There is no dispute that the State has preserved its right to contest the compensation it is  
entitled to from the United States. *See* Fed. R. Civ. P. 71.1, 71.1(e)(3).

1           The presumptive measure of just compensation is the fair market value of the  
2 condemned property at the time of the taking. *Duncanville*, 469 U.S. at 29. For some  
3 property, however, fair market value is impossible to determine. Property that is  
4 “seldom, if ever, sold in the open market” has no ascertainable market value. *Id.* at 30.  
5 Property dedicated solely to public facilities like townships, roads, public playgrounds, or  
6 sewer systems typically has no market value. *See, e.g., id.* at 30 n.12; *United States v.*  
7 *564.54 Acres of Land*, 441 U.S. 506, 513 (1979); *United States v. Certain Property in*  
8 *Manhattan (“Recreation Center”)*, 403 F.2d 800, 802-03 (2d Cir. 1968). In this case, the  
9 parties agree that the condemned property, which served solely as a right-of-way for I-5,  
10 has no ascertainable market value.

11           Courts have developed the substitute facilities doctrine to address just  
12 compensation for the condemnation of public facilities without market value. *See*  
13 *Duncanville*, 469 U.S. at 31-32 (pointing to a dictum in *Brown v. United States*, 263 U.S.  
14 78, 83 (1923) “as the source of what has become known as the ‘substitute facilities  
15 doctrine’”). Although the parties dispute the precise formulation of the doctrine, it  
16 suffices for introductory purposes to note that it requires the condemnor to compensate  
17 the condemnee for the cost of an adequate substitute facility. *See, e.g., California (“San*  
18 *Francisco Tidelands”)* v. *United States*, 169 F.2d 924, 925 (9th Cir. 1948); *Recreation*  
19 *Center*, 403 F.2d at 803 (“Simply stated, this rule insures that sufficient damages will be  
20 awarded to finance a replacement for the condemned facility.”) (cited in *Duncanville*, 469  
21 U.S. at 32 n.16). The substitute facilities doctrine applies only where the fair market  
22 value of the condemned property is not ascertainable. *Duncanville*, 469 U.S. at 26.

23           In this case, the parties do not dispute that the substitute facilities doctrine applies.  
24 Instead, they dispute whether, in addition to the elevated roadway that the United States  
25 has agreed to provide, the State is entitled to the increased operation and maintenance  
26 costs of the roadway. Neither Supreme Court nor Ninth Circuit authority squarely  
27 resolves this legal dispute, but, for the reasons stated in the next section, the court’s

1 review of existing case law leads it to conclude that the State is entitled to the increased  
2 costs of operating and maintaining the elevated road.

3 **B. A Court May Award Money Damages for Increased Costs in Addition to an**  
4 **Adequate Substitute for a Condemned Facility.**

5 The parties focus much of their attention on *Washington v. United States*  
6 (“*Hanford*”), 214 F.2d 33 (1954), which arose in the wake of the United States’  
7 condemnation of property for the Hanford Atomic Energy Project. The court concluded  
8 that the State was entitled only to nominal damages for the condemnation of a 28-mile  
9 section of a highway traversing the Hanford Project. *Id.* at 36-37. The court found that  
10 the condemnation of other lands to create the Hanford Project had so greatly reduced the  
11 need to travel on the road that existing state highways were adequate to serve any  
12 remaining traffic. *Id.* at 41-44 (reviewing evidence before trial court). The court  
13 concluded that “since there was [sic] in existence adequate substitutes for Highway 11A,  
14 there was no reasonable necessity for its replacement.” *Id.* at 44. For that reason, the  
15 court affirmed the trial court’s one-dollar nominal damages judgment as compensation  
16 for the taking. *Id.* at 47.

17 Because the *Hanford* court found that no substitute facility was necessary, it  
18 addressed the proper compensation under the substitute facilities doctrine only in dicta.  
19 See 214 F.2d at 47 (“Since there existed no reasonable necessity in 1943 for replacing the  
20 highway taken, we never reach the question of the reasonable substitute, and its costs.”).  
21 The dicta in *Hanford* is plentiful, and the United States frequently relies on it. It insists,  
22 for example, that the *Hanford* court imposed two mutually exclusive compensation  
23 alternatives when it stated that where “no other road . . . can adequately handle the traffic  
24 diverted from the road taken, the government is required to provide a substitute road *or*  
25 its equivalent in money.” *Id.* at 40 (emphasis added). In the United States’ view, the  
26 State is entitled to money or a substitute facility, but never both. Similarly, the United  
27 States seizes upon the *Hanford* court’s quotation of other cases for the proposition that

1 providing a substitute facility of “equal utility” satisfies its compensation obligation. 214  
2 F.2d at 40 (quoting *Jefferson County v. Tennessee Valley Authority*, 146 F.2d 564, 565  
3 (6th Cir. 1945), and *City of Fort Worth v. United States*, 188 F.2d 217, 222 (5th Cir.  
4 1951)). Because the elevated roadway will undisputedly convey traffic just as effectively  
5 as its surface-level predecessor, the United States claims that it has provided a substitute  
6 of equal utility, thus satisfying its “just compensation” obligation.

7       Neither of the United States’ interpretations of *Hanford* withstand scrutiny.  
8 Neither *Hanford* nor any other authority bars a court from awarding “just compensation”  
9 that combines a substitute facility with a monetary award. Setting “equal utility” as the  
10 standard of compensation does little to settle this dispute. The State’s contention is that  
11 the elevated roadway is not equal in utility to its predecessor, because the elevated  
12 roadway will cost an additional \$12 million to convey traffic equally effectively. The  
13 United States’ implicit assertion that “utility” means no more than functionality is  
14 unsupported by case law or logic. If, hypothetically, the United States built a shoddy  
15 temporary overpass to replace the condemned roadway, knowing that it would last no  
16 more than a year under normal traffic conditions, it surely could not argue that providing  
17 a functional replacement roadway obviated the need to pay compensation for the  
18 inevitable construction of a permanent substitute. The court’s duty is to fashion an award  
19 that permits the State to “readjust its . . . highway system to serve [its] requirements and  
20 needs in as adequate a manner and extent and with equal utility as such system would  
21 have provided had the facility in question not been condemned, so far as this is  
22 reasonably practical.” *Fort Worth*, 188 F.2d at 222 (cited in *Hanford*, 214 F.2d at 40).  
23 Here, assuming the accuracy of the State’s projection of increased costs, it cannot meet  
24 its traffic needs without spending \$12 million more than it would have spent absent the  
25 condemnation. If the United States’ obligation is to pay “the entire cost of restoring to  
26 [the State’s] citizens an adequate highway system,” *Jefferson County*, 146 F.2d at 566,  
27

1 then it must pay the increased cost of maintenance as well. *See also id.* at 565 (noting  
2 obligation to “pay the cost of road facilities equal to those destroyed”).

3 Other Ninth Circuit authority, and out-of-circuit authority on which the Ninth  
4 Circuit has relied, is also inconsistent with the United States’ assertion that the court  
5 cannot award increased costs. The court noted in the previous paragraph that the  
6 formulations of the substitute facilities doctrine in *Fort Worth* and *Jefferson County*  
7 support the State’s position. In *San Francisco Tidelands*, the court noted that the  
8 “fundamental principle” of the substitute facilities doctrine is that “the public authority  
9 charged with furnishing and maintaining the public way . . . must be awarded the actual  
10 money loss which will be occasioned by the condemnation[,] . . . usually the cost of  
11 furnishing and constructing substitute roads.” 169 F.2d at 925 (quoting *United States v.*  
12 *Arkansas*, 164 F.2d 943, 944 (8th Cir. 1947)).<sup>2</sup> Maintenance and related costs are thus  
13 appropriate to consider when considering the loss to the condemnee.<sup>3</sup> Indeed, when  
14 courts award nominal damages to condemnees who have no need to build substitute  
15 facilities, they inevitably note that the condemnee is relieved of the “burden of  
16 maintaining” the taken facility. *E.g.*, *Hanford*, 214 F.2d at 39 (quoting *San Francisco*  
17 *Tidelands*, 169 F.2d at 924); *California (“Naval Shipyard”) v. United States*, 395 F.2d  
18 261, 265 n.8 (9th Cir. 1968) (citing cases). Courts properly consider increased or  
19 decreased costs when determining just compensation for condemned public facilities.  
20 *See Naval Shipyard*, 395 F.2d at 265 n.8; *see also Jefferson County*, 146 F.2d at 565

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21 <sup>2</sup> The *San Francisco Tidelands* court, like the *Hanford* court, concluded that no substitute was  
22 necessary for the condemned property. 169 F.2d at 925. Its comments on the assessment of  
23 appropriate compensation where a substitute is necessary are, like similar comments in *Hanford*,  
dicta.

24 <sup>3</sup> Two other out-of-circuit cases recognize maintenance costs as an element of just compensation.  
25 In *United States v. Wheeler Township*, the court noted that there is “no injustice to [the  
26 condemnor] in being required to make good to the township taxpayers the added expense for that  
27 character of construction and maintenance of . . . established roads.” 66 F.2d 977, 985 (8th Cir.  
1933). In *Town of Bedford v. United States*, 23 F.2d 453, 456 (1st Cir. 1927), the court  
recognized the condemnee’s property right as the “right to exoneration from the burden of  
constructing and maintaining a substitute way.”

1 (noting that the local government is burdened with “the construction and maintenance of  
2 highways”). Indeed, in *United States v. Arkansas*, the court awarded increased  
3 operational costs to the local government to compensate it for a temporary ferry it was  
4 obliged to operate during the construction of a substitute highway. 164 F.2d at 944-45.

5 The substitute facilities doctrine requires compensation for the cost of a necessary  
6 substitute facility. Here, although the United States will foot the bill for the construction  
7 of an adequate substitute, it asserts that it can avoid payment for the additional costs that  
8 its substitute will impose on the State. Principles of Fifth Amendment “just  
9 compensation,” as expressed by courts that have considered appropriate compensation for  
10 the condemnation of public facilities, are broad enough to encompass such costs.

11 Before concluding, the court addresses several of the United States’ additional  
12 arguments for avoiding payment for increased maintenance and operational costs. First,  
13 the court places no weight on the absence of claims for increased costs in other cases that  
14 invoke the substitute facilities doctrine. For example, the United States contends that  
15 Washington’s failure to seek additional maintenance costs for the longer highway that  
16 was found to be an adequate substitute for the condemned highway in *Hanford* suggests  
17 that such costs are not permissible as a component of just compensation. The inference  
18 that the United States urges upon the court is no more plausible than any other  
19 hypothetical explanation for Washington’s silence in *Hanford*: the substitute highway  
20 was an existing facility, not a newly constructed one, so there may have been no increase  
21 in maintenance costs; Washington may have never considered its additional maintenance  
22 costs; Washington may have found that the decrease in maintenance costs attributable to  
23 the condemnation more than offset any increase in costs at the substitute highway. There  
24 is no reason for the court to interpret the silence of litigants in decades-old cases as  
25 favoring the United States’ position.

26 Second, while the court acknowledges that “consequential damages” to the  
27 condemnee are not compensable under the Fifth Amendment (*Duncanville*, 469 U.S. at



33, *United States ex rel. Tennessee Valley Authority v. Powelson*, 319 U.S. 266, 282-83 (1943)), the damages the State claims here have never (so far as the court is aware) been declared “consequential” by any other court. Consequential damages include opportunity costs, lost profits from the operation of an enterprise located on the taken property, loss of goodwill, and relocation expenses. *E.g.*, *Powelson*, 319 U.S. at 281-82; *United States v. General Motors Corp.*, 323 U.S. 373, 379-80 (1945); *United States v. Petty Motor Co.*, 327 U.S. 372, 378 (1946). In light of previously cited authority that places maintenance and operation costs within the realm of compensable damages, the court cannot accept the United States’ assertion that such costs are uncompensable consequential damages. Indeed, in *United States v. Arkansas*, the court distinguished the operating cost of a ferry used as a temporary substitute facility from the consequential damages deemed uncompensable in *Petty Motor*. 164 F.2d at 944-45.

The United States’ reliance on *United States v. 25.4 Acres of Land* (“*New York Trolley*”), 71 F. Supp. 255 (E.D.N.Y. 1947) is misplaced for similar reasons. There, the court concluded that New York City had failed to establish that a trolley-track reroute required after a condemnation caused it to suffer an operating loss on the trolley line. *Id.* at 262 (finding that the “greater outlay in the cost of operation . . . has been compensated by a higher percentage of net revenue per car mile”). The *New York Trolley* court did not exclude the possibility that increased operations costs might justify an increase in compensation to the condemnee, it merely found that the condemnee had not established a net increase in operations costs.


#### IV. CONCLUSION

For the reasons stated above, the court GRANTS the State’s summary judgment motion (Dkt. # 14) and DENIES the United States’ summary judgment motion (Dkt. # 17). The court holds that increased maintenance and operation costs occasioned by the elevated roadway may be considered in determining the just compensation due to the

1 State, and that just compensation may include a monetary award in addition to the  
2 substitute facility.

3 The court emphasizes that its holding today does not establish that the State is  
4 entitled to money compensation in addition to the elevated highway. The court has  
5 accepted the State's assertion of increased maintenance costs solely for purposes of  
6 resolving the parties' legal question. As the parties have already agreed,<sup>4</sup> the amount, if  
7 any, of additional compensation owed to the State is a question of fact that the parties  
8 must resolve between themselves or by presenting their dispute to a trier of fact.

9 DATED this 22nd day of August, 2008.

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11   
12 The Honorable Richard A. Jones  
13 United States District Judge  
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26 <sup>4</sup> At the parties' request, the court bifurcated this action between a determination of the legal  
27 question presented in these motions and, in the event the legal determination favored the state,  
28 discovery and motion practice devoted to determining just compensation. See Dkt. ## 11, 12.